

May 13, 2008

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VIA HAND DELIVERY AND ECFS

FILED/ACCEPTED

MAY 13 2008

Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C 20554

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Re: REDACTED – FOR PUBLIC INSPECTION

*Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C.
§ 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area,
WC Docket No. 08-49.*

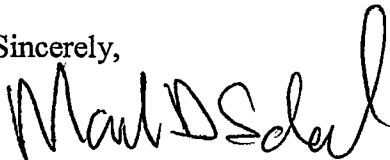
Dear Ms. Dortch:

This letter provides notice for the public record that, on behalf of Cavalier Telephone, LLC ("Cavalier"), undersigned counsel today had delivered to the Commission, via hand delivery, an unredacted version of Cavalier's Opposition to Verizon's Petition for Forbearance ("Opposition") in the above-captioned proceeding, containing certain confidential and highly confidential material subject to the First Protective Order and Second Protective Order adopted in this proceeding. Cavalier also hereby submits two copies of the redacted version of its Opposition via hand delivery, and is filing the redacted version of its Opposition via ECFS.

As specified in the Second Protective Order, and pursuant to a conversation with Gary Remondino on May 13, Mr. Remondino will be provided with two paper copies of the unredacted Opposition containing highly confidential information. Additionally, the redacted and unredacted versions will be served today on counsel for the parties named on the attached service list via overnight delivery.

The highly confidential, unredacted version of the Opposition will be made available for inspection, pursuant to the terms of the First Protective Order and Second Protective Order, at the office of Jenner & Block LLP, 13th Street, N.W., Suite 1200, Washington, D.C. 20005, until May 23, 2008, and thereafter at Jenner & Block LLP, 1099 New York Avenue, NW, Suite 900, Washington, DC 20001-4412. Arrangements for inspection may be made by contacting Duane C. Pozza at the above addresses at (202) 639-6000.

Sincerely,



Mark D. Schneider

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

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for Forbearance Pursuant to)
47 U.S.C. § 160(c) in Cox's Service Territory in)
Virginia Beach Metropolitan Statistical Area)

WC Docket No. 08-49

CAVALIER TELEPHONE, LLC'S OPPOSITION TO VERIZON'S
PETITION FOR FORBEARANCE

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May 13, 2008

SUMMARY

The Commission rejected Verizon's previous Virginia Beach forbearance petition five months ago because it concluded that competition in the MSA is not adequate, and the Commission could find no other basis in the record for concluding that section 10 is satisfied. The only changes that have occurred since then are that Verizon has *raised rates* in Virginia Beach and, in order to obtain retail rate deregulation, assured the Virginia State Corporation Commission that it will continue to make the network elements at issue here available at TELRIC rates to competitors. Verizon nevertheless again asks this Commission to relieve it of these unbundling obligations as well as the other regulatory requirements targeted by its previous forbearance petition. In doing so, Verizon merely rearranges the same evidence the Commission has already found inadequate.

Initially, Verizon's petition should be rejected because it attempts improperly to gerrymander the "market" for which it seeks forbearance by excluding from the analysis the few small counties within the MSA where Verizon's market power is at its greatest. No competitor will serve these excluded counties if essential unbundled network elements are not also available in surrounding areas. Verizon's result-oriented approach would thus effectively impact the entire MSA by looking only to the parts of the MSA most favorable to its cause. That gamesmanship should be rejected. Further, Verizon contravenes settled Commission precedent by asking the Commission to examine unbundling at the rate center rather than the wire center level.

Verizon's other attempts to skew the data should also be rejected. Verizon principally relies on cut-the-cord wireless customers as competition to its dominant market position, but provides no evidence that wireless services are competitive substitutes. Moreover, even if it were appropriate to consider wireless cut-the-cord customers in determining Verizon's market

share, Verizon improperly attributes its own Verizon Wireless customers to the competitive side of the analysis. And Verizon vastly overstates the number of cut-the-cord customers in Virginia Beach by using a national estimate of a 13.6 % substitution rate when Verizon itself recently provided evidence showing that only 6 % of Virginia households are solely wireless.

Verizon's estimates of cable and CLEC competition are similarly flawed. Verizon relies on white pages listings even as it acknowledges that white pages data for Verizon's own lines are off by more than **[Begin Confidential]** **[End Confidential]** lines. Additionally, the State Commission has found numerous inaccuracies in Verizon's white pages listings.

Verizon's treatment of the enterprise market is no better. Verizon provides no data on the level of competition but merely resuscitates anecdotal evidence derived primarily from websites, which the Commission rejected in the *Six MSA Order*. And Verizon's reliance on claimed reductions in the number of lines it serves was likewise flatly rejected as unreliable.

Verizon also argues that the impairment standard of Section 251(d)(2) is not met and that therefore the Commission cannot lawfully maintain unbundling obligations here. But Verizon has not even attempted to explain how it meets the Commission's impairment tests. Those tests require specific showings of facilities-based competition that cannot possibly be met here.

Finally, granting forbearance would have disastrous consequences for Verizon's charges and practices, consumers, and the public interest. Cavalier owns substantial facilities in the Virginia Beach area, but is dependent upon unbundled loops leased from Verizon to provide telephone, Internet, and television service – all at lower rates than are charged by Verizon and Cox. Cavalier would likely exit the entire Virginia Beach MSA if Verizon's petition were granted. That would leave thousands of customers without service, and would mean higher

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rates, fewer services, and harm to all consumers. That is inconsistent with the public interest, and Verizon's petition should be denied.

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the Virginia Beach Metropolitan Statistical Area)	
)	

OPPOSITION

Cavalier Telephone Corporation ("Cavalier") respectfully submits this opposition to the forbearance petition submitted by the Verizon Telephone Companies ("Verizon") in the above-captioned proceeding.¹

I. INTRODUCTION

Verizon's petition for forbearance for most (but not quite all) of the Virginia Beach MSA is a repackaged version of its forbearance request for the Virginia Beach MSA that the Commission rejected a mere five months ago.² In the *Six MSA Order*, the Commission concluded that "the record evidence in this proceeding demonstrates that Verizon is not subject to a sufficient level of facilities-based competition in the [the Virginia Beach MSA] to grant relief."³ The level of competition in Virginia Beach has not changed since the Commission last

¹ Specifically, Verizon seeks forbearance from enforcing the loop and transport unbundling requirements of section 251(c), the dominant carrier regulations applicable to its mass market switched access services under Title II of the Act, and the obligations imposed in the Computer III Inquiry, including open network architecture ("ONA") and comparably efficient interconnection ("CEI") requirements, governing Verizon's incumbent local exchange operations in Cox's service area of Virginia Beach.

² *In re Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) ("*Six MSA Order*").

³ *Six MSA Order* ¶ 36; see also *id.* ¶¶ 33, 34, 43, 44.

denied Verizon's application, and Verizon's petition offers nothing that would alter this conclusion. The new petition manipulates the same data, massages the same evidence the Commission previously found inadequate, and chooses not to "count" certain discrete pockets of customers within the MSA in an attempt to mask the shortcomings of Verizon's previous effort. In fact, only two changes have occurred in the last five months that are of any import here. First, despite Verizon's claims that its market power is sufficiently constrained by competition that forbearance is warranted, Verizon has recently *raised rates* in Virginia Beach.⁴ And second, Verizon has asked the Virginia State Corporation Commission to deregulate its retail rates on the ground that it will continue to make the network elements at issue here available at TELRIC rates to competitors. As Verizon explained to the State Commission, "with the recent FCC decision in the Verizon forbearance case that Verizon must continue to provide UNE-loops in the Virginia Beach area, the likelihood that Verizon will be relieved from providing UNE-loops at TELRIC rates in any part of the state appears slim."⁵ These facts highlight that forbearance is not warranted and call into question the credibility of Verizon's filings here and before the State Commission.

To obtain forbearance, Verizon must show, for each of the regulations from which it seeks relief, that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2)

⁴ See Virginia SCC Tariff Filing Log, dated Jan. 9, 2008 & April 23, 2008 (attached as Exhibit 1). For example, Verizon just increased its rates for Unlimited Local Usage for Business. Moreover, the Log shows that as of December 2007, Verizon raised its rates for Asynchronous Transfer Mode (ATM), Cell Relay Service (CRS). In November 2007, Verizon increased the rates for Analog Channel, Digital Data and High Capacity Digital services as well as for select Fractional T-1, Private Line and Special Access services.

⁵ *In re Application of Verizon Virginia Inc. and Verizon South Inc. for a Determination that Retail Services are Competitive and Deregulating and Detariffing of the Same*, Petition for Reconsideration, December 28, 2007, Virginia State Corporation Commission, Case No. PUC-2007-00008, at 3-4 (attached as Exhibit 2).

enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁶ The touchstone for making these determinations is the extent of competition.⁷ As discussed below, regardless how Virginia Beach is sliced and diced, the market does not meet the statutory criteria for forbearance. As a result, granting forbearance would have significant negative consequences for consumers and for the competitive carriers that are currently serving them. Cavalier, in particular, likely would have to shut down in Virginia Beach if this petition were granted.

Cavalier owns substantial switching, transmission, and other facilities in the Virginia Beach area. However, it remains absolutely dependent upon DS0 loops leased from Verizon under sections 251 and 252 of the Act, to provide telephone, Internet, and television service.⁸ Without these Verizon facilities, Cavalier could not continue to provide service, and without the requirements of section 251 and 252 in place, Verizon will have no reason to continue to provide these facilities to Cavalier at an economically viable price. It is therefore not hyperbole to say that this petition can mean life or death for Cavalier's Virginia Beach business.

That business is a substantial part of the competitive landscape in Virginia Beach. Cavalier has **[Begin Highly Confidential]** **[End Highly Confidential]** customers throughout the areas of Virginia Beach where Verizon seeks forbearance.⁹ Cavalier is the only CLEC remaining in Virginia Beach that serves residential customers in any meaningful numbers.

⁶ See 47 U.S.C. § 160(a).

⁷ See *Six MSA Order* ¶¶ 27, 33, 34; *In re Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in Omaha Metro. Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19,415, ¶ 13 (2005) ("*Omaha Forbearance Order*"); see also 47 U.S.C. § 160(b) ("In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.").

⁸ Cavalier also has a small number of resale and Wholesale Advantage customers.

⁹ Declaration of Sean Wainwright ("*Wainright Decl.*"), attached as Exhibit 3, ¶ 5.

Cavalier is also the only facilities-based competitive provider in Virginia Beach for traditional customers of plain old telephone service or "POTS" without high speed internet or cable.¹⁰

Moreover, Cavalier provides the lowest price unlimited long distance phone service in Virginia Beach, greatly valued by an otherwise underserved class of customer. Cavalier's prices for phone service, including voicemail and unlimited long distance, are on average about \$10 a month cheaper than either Verizon or Cox.¹¹

Cavalier also makes high speed DSL services more affordable to consumers. Cavalier recently announced the launch a new service bundle in Virginia Beach and elsewhere providing unlimited local and long distance phone service with 12 free calling features, coupled with un-throttled hi-speed Internet service enhanced with Google Apps for a non-promotional rate of \$50/month.¹² A similar bundle of services costs approximately \$104 from Verizon and \$115 from Cox.¹³

In addition, Cavalier is the only triple-play telecommunications alternative to Cox and Verizon for residential service in Virginia Beach. Cavalier is an industry pioneer in a competitive TV service that uses MPEG 4 video compression to provide over 150 channels of television over Cavalier's existing DSL network – all delivered over traditional copper loops.¹⁴ Unlike Verizon's FiOS, Cavalier is able to serve older neighborhoods with copper facilities, so Cavalier provides service in the inner city, not just in the suburban fringe.¹⁵ In Virginia Beach, Cavalier offers telephone, high-speed Internet, and 150 all digital video channels for \$95.95,

¹⁰ *Id.*

¹¹ *Id.*

¹² Wainwright Decl. ¶ 3.

¹³ *See* Wainwright Decl., Ex. A.

¹⁴ Wainwright Decl. ¶ 6.

¹⁵ *Id.*

compared to prices of approximately \$132 from Verizon and \$142 from Cox for similar bundles.¹⁶

Cavalier also serves nearly [Begin Highly Confidential] [End Highly Confidential] small business and enterprise customers of all sizes throughout Virginia Beach, including hospitals, fire departments, and schools.¹⁷ Cavalier provides these customers a comprehensive suite of voice and data products. Specifically, it provides businesses high speed Internet service delivered over Cavalier's network using ADSL 2+ technology, 10mb Ethernet pipes, site-to-site private lines, and full T1s. Cavalier's small business packages offer a 10-15% savings to consumers on average based upon comparable service offerings from Cox or Verizon.¹⁸ The large majority of Cavalier's business customers are small and medium companies.¹⁹

Finally, Cavalier also serves a large number of government and public clients in the Virginia Beach area. These clients include: the North Atlantic Treaty Organization (NATO), the Supreme Allied Commander Transformation (SACT, a Division of NATO), the Department of Veterans Affairs - V.A. Hospital - Hampton, the United States Navy, the United States District Court - Newport News, the United States Coast Guard, the City of Virginia Beach, the City of Hampton, the City of Newport News, and the City of Portsmouth.²⁰ In Norfolk, Cavalier provides rapid deployment groups for the United States Coast Guard, which use a VoIP application for homeland security and disaster response. This application was used in New Orleans to respond to the aftermath of Hurricane Katrina.²¹

¹⁶ See Wainwright Decl., Ex. A.

¹⁷ Wainwright Decl. ¶ 4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Declaration of Mike Magliato ("Magliato Decl."), attached as Exhibit 4, ¶ 3.

²¹ *Id.*

As it does with its other customers, Cavalier serves its government clients, including those in the Virginia Beach area, through a combination of unbundled network elements (“UNEs”) and its own facilities and equipment.²² Cavalier has built a \$1.2 billion fiber network but relies on local incumbents for last-mile facilities. As a result, Cavalier controls operating costs, quality of service, and product development and deployment. This allows Cavalier to pass significant savings on to its government customers, many of whom are particularly price sensitive.²³

For Cavalier, there are no available alternatives to the UNEs Cavalier leases from Verizon at regulated rates, and that are essential for Cavalier to provide service. Verizon is the only source of the facilities Cavalier needs to serve its customers.²⁴ Verizon does not have a special access wholesale offering that could reasonably substitute for the unbundled copper loops which are essential to Cavalier’s services.²⁵ Although Verizon offers voice-grade loops as a special access service, it is at a much higher price than unbundled copper loops, and it is a voice-grade service only, meaning that Cavalier could not provide DSL, VoIP, or IPTV services.²⁶ Cavalier’s only realistic access to the vast majority of customers is over unbundled UNE loops. Based on Verizon’s pricing for network elements that have been relieved of 251 unbundling requirements elsewhere, it will not be economically viable for Cavalier to lease facilities from Verizon if this petition is granted.

While Verizon claims that if it is granted forbearance from its unbundling obligations, Cavalier will still be able to “purchase unbundled loops pursuant to Section 271 of the Act,”

²² *Id.* ¶ 4.

²³ *Id.*

²⁴ Declaration of Jim Vermeulen (“Vermeulen Decl.”), attached as Exhibit 11, ¶¶ 8-10.

²⁵ *Id.* ¶ 6.

²⁶ *Id.* ¶ 5.

experience with Verizon has taught Cavalier otherwise. Verizon made the same argument to advocate eliminating UNE-P, and then immediately raised its wholesale rates to non-competitive levels and effectively eliminated that form of competitive service. During the Verizon Six MSA proceeding, Cavalier tried to elicit from Verizon what it would charge for unbundled loops if its petitions were granted, but Verizon never responded.²⁷ Additionally, after Qwest's petition for forbearance was granted for the Omaha market, Qwest's demand for higher loop rates led a competitive carrier to withdraw completely from the market. Based on that history and upon information submitted to Cavalier under Verizon's "Wholesale Advantage Program," Cavalier expects that Verizon will charge a price for loops that is not economically feasible for competitors.²⁸

Additionally, although a grant of Verizon's petition would not end the availability of section 251 unbundled loops and transport in the few counties that Verizon's petition has excised from the Virginia Beach MSA, it is not economically viable to serve these communities in isolation.³¹ Cavalier has thus concluded that if the Commission grants the requested forbearance relief, Cavalier will likely exit the entire Virginia Beach MSA.³²

That would bring immediate harm to Cavalier's [Begin Highly Confidential] [End Highly Confidential] residential and [Begin Highly Confidential] [End Highly Confidential] small business and enterprise customers, who would likely lose service. More broadly, the Virginia Beach market would become significantly less competitive, leading to higher prices and fewer services for all consumers. Cavalier's innovative low-cost voice-only,

²⁷ See Vermeulen Decl., Ex. B.

²⁸ See Vermeulen Decl. ¶¶ 7, 9; Wainright Decl. ¶ 12.

³¹ Wainright Decl. ¶ 14.

³² *Id.* ¶ 15.

Internet, and video services would be gone, and the prices all consumers would pay for these kinds of services would be higher. Particular groups of customers – residential customers who might not otherwise qualify for service, inner-city customers for which Verizon is unlikely to upgrade its facilities, and enterprise customers – are unlikely to have any competitive choices at all if this petition is granted. In short, a grant of this petition would mean unreasonable charges and practices for both wholesale and retail customers, and harm to consumers. That is inconsistent with the public interest, and the petition should be denied on that basis alone.³³

II. THE COMMISSION SHOULD REJECT VERIZON'S ATTEMPT TO GERRYMANDER THE MARKET FOR WHICH IT SEEKS FORBEARANCE

Verizon's petition should be rejected because Verizon is attempting improperly to gerrymander the "market" for which it seeks forbearance. The Commission rejected Verizon's previous Virginia Beach forbearance petition several months ago because "Verizon's market shares in the MSAs at issue . . . are sufficiently high to suggest that competition in these MSAs is not adequate" and the Commission could "find no other basis in the record for concluding that

³³ See *Six MSA Order* ¶ 44. As a source for comparison, the Commission recently granted forbearance relief to Qwest in the Terry, Montana local exchange. See *In re Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, Memorandum Opinion and Order, WC Docket No. 07-9, FCC 08-118 (rel. April 21, 2008). The competitive landscape in Terry could not be more different than the situation in Virginia Beach. In Terry, there were no competitors that relied on Qwest's interconnection, wholesale, or UNE services. In addition, the Commission found that the sole competitive carrier in Terry, Mid-Rivers Telephone Cooperative ("Mid-Rivers"), had facilities which were technically superior to Qwest's. Furthermore, Mid-Rivers served substantially all of the customers in the Terry exchange. Mid-Rivers itself stated on the record that it did not oppose the petition and was "indifferent to Qwest's regulatory status because it is not dependent on Qwest services or facilities to offer its services." *Id.* ¶ 9 n.37. Thus, the "unique" situation in Terry (as the Commission phrased it) is inapposite to the Virginia Beach market. *Id.* ¶ 14. Indeed, unlike Mid-Rivers, Cavalier relies on Verizon for interconnection, vehemently opposes Verizon's petition, and evidence points to Verizon remaining the dominant carrier in the market.

section 10[] is satisfied.³⁴ Other than rehashing a cable coverage argument the Commission properly rejected in the *Six MSA Order*,³⁵ Verizon's new Virginia Beach petition focuses solely on disputing the Commission's market share findings. In doing so, Verizon does not rely on growing competition in the MSA. Instead, it proposes to carve out discrete bits and pieces from the MSA so that it can (wrongly) claim that the remaining parts of the MSA meet the Commission's competitive requirements. And, at the same time, it asks the Commission to determine unbundling forbearance by examining data at the rate center rather than the wire center level, contrary to settled Commission precedent. Both of these maneuvers should be rejected.

A. Verizon Has Offered No Basis To Define The Geographic Market Solely By Excluding Areas Where Verizon's Market Power Is Greatest

In its petition, Verizon has graciously agreed to continue to be treated as a dominant carrier and unbundle network elements for the 9,184 residents of Matthews County (and a few other small counties), while it seeks forbearance for all of the surrounding counties. It does so because there is virtually no competition in these few counties, and including them within the MSA (as Verizon did previously) would increase its market share above what it evidently believes is a critical threshold. But Verizon's concession is irrelevant for any purpose other than artificially defining a geographic area solely designed to deflate Verizon's market share. If the dominant carrier and UNE regulations are necessary in Matthews County, for example, granting forbearance in all of the surrounding counties will most assuredly destroy competition in Matthews County as well. Neither Cavalier nor any other competitor will serve Matthews County because UNE loops are available there, when those loops are not available in surrounding counties. Verizon's approach would thus determine the impact on the entire MSA

³⁴ *Six MSA Order* ¶¶ 27, 32; see also *id.* ¶¶ 36, 45.

³⁵ See *id.* ¶ 37 n.113.

by looking only to the parts of the MSA most favorable to its cause. It is unsurprising that Verizon's approach finds no support in Commission precedent.

With respect to analyzing petitions for forbearance from dominant carrier regulation, the Commission has explained that its inquiry is based on "the Commission's traditional market power analysis," which looks at "the ability . . . to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable."³⁶ While the Commission has employed different geographic definitions in different contexts to undertake this analysis, the geographic definition chosen must facilitate the determination of market power.³⁷ Here, although Verizon's requested relief would undoubtedly impact the entire MSA, Verizon has offered no explanation of how defining the market solely by excluding areas like Matthews County where Cox does not provide service – and hence where Verizon is a monopoly provider – aids in determining Verizon's market power across the MSA. Indeed, Verizon's approach turns the market power analysis on its head. In the areas that Verizon has excluded but will certainly be affected by a grant of its petition, its ability to raise prices is at its maximum, and its market power is at its greatest.³⁸

The entirety of Verizon's justification for this market definition is that the proposed service area is "reasonable" because it, like an MSA, is comprised of collections of counties and

³⁶ *Omaha Forbearance Order* ¶ 18 & n.54 (quoting *In re Policy & Rules Concerning Rates for Competitive Common Carrier Services and Facilities, Authorizations Therefor*, Fourth Report and Order, 95 FCC 2d 554, ¶¶ 7, 8 (1983)) (internal quotation marks omitted).

³⁷ *See Omaha Forbearance Order* ¶ 50 n.129.

³⁸ The Commission has recognized the possibility that a forbearance petition can have implications beyond the particular areas for which forbearance is ostensibly sought. *See Six MSA Order* ¶ 32 n.102. The Commission has thus made clear that "applicants for forbearance relief from dominant carrier rate regulation should address whether and how a grant of relief at the geographic level they seek would impact other rates in the applicable study area." *Id.* Verizon has offered no discussion of this impact whatsoever.

independent cities.³⁹ But while their borders may track counties and cities, MSAs are deliberately drawn to define a cognizable and highly-integrated geographic area; as the Census Bureau explains, “[t]he general concept of a metropolitan or micropolitan statistical area is that of a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core.”⁴⁰ In contrast, Verizon’s exclusion of small discrete counties is arbitrary and self-serving. Verizon’s slicing of the Virginia Beach MSA in its Petition is a transparent attempt to manipulate the numbers to attempt to fit into the holding of the *Six MSA Order*.

It is also no answer for Verizon to attempt to justify its market definition as merely an amalgam of wire centers, which the Commission analyzes on an individual basis in determining forbearance from unbundling obligations (a test, that, as discussed below, is also problematic for Verizon). The Commission examines individual wire centers only after determining, “as a threshold matter,” that the larger geographic area “is sufficiently competitive to support forbearance.”⁴¹ Thus, the Commission found in the *Six MSA Order* that, whatever the level of

³⁹ Petition at 4.

⁴⁰ U.S. Census Bureau, *About Metropolitan and Micropolitan Statistical Areas*, at <http://www.census.gov/population/www/estimates/aboutmetro.html>.

⁴¹ *In re Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area* Opinion and Order, 22 FCC Rcd 1958, ¶ 26 (2007) (“*ACS UNE Forbearance Order*”) (Before examining individual wire centers, “we examine the level of retail competition and the role of the wholesale market in the study area to determine as a threshold matter whether the Anchorage study area is sufficiently competitive to support forbearance.”); *see also Omaha Forbearance Order* ¶¶ 23-49 (finding Qwest to be nondominant with respect to a number of services throughout Qwest’s entire service area in the Omaha MSA before undertaking unbundling analysis).

competition in particular wire centers, “the current evidence of facilities-based competition in these MSAs is insufficient to justify forbearance.”⁴²

The Commission’s approach makes sense. Requiring a threshold test of competition across the larger geographic market is essential to determining unbundling forbearance, as a competitor cannot economically serve only those wire centers where unbundling is still offered if the geographic market as a whole is not sufficiently competitive to obtain different facilities to serve other wire centers. That is particularly important in Virginia Beach, where Cavalier offers vigorous facilities-based competition, but can do so only by using Verizon’s last-mile facilities.

B. Verizon Offers No Basis To Depart From Commission Precedent That Requires Analyzing Unbundling On A Wire Center Basis

Moreover, even if Verizon could meet the threshold test of showing sufficient competition across the MSA – which it cannot – Verizon further errs in seeking to have unbundling analyzed on a rate center, rather than a wire center basis. The Commission has made clear that in conducting its forbearance analysis with respect to unbundling loops and transport, it provides relief only in individual wire centers that are demonstrably competitive.⁴³ The Commission’s focus on individual wire centers is based on extensive analysis of the proper way to examine the economic feasibility of self-provisioning specific network elements. Even if an MSA as a whole is competitive, due to wide variations in geography and population, particular wire centers may not be sufficiently competitive to make service possible without access to unbundled loops and transport. Thus, with respect to loops, the Commission’s “wire center-

⁴² See *Six MSA Order* ¶ 36. The Commission stated that “future relief from unbundling obligations might be warranted in such wire centers upon a showing of a more competitive environment in these MSAs.” *Id.*

⁴³ See *Omaha Forbearance Order* ¶ 50 n.129 (“when evaluating whether certain network elements should be made available on an unbundled basis, which implicates issues of economic self-provisioning, the Commission has focused its analysis on wire centers, which is also the approach we adopt today when analyzing Qwest’s unbundling obligations arising under section 251 and section 271 of the Act”).

based approach yields reasonably precise results that link impairment to the factor that most prominently determines whether construction of a competitive facility is economic – namely, the presence of extensive competitive fiber rings within an area, as evidenced by competitive fiber-based collocations and high business line counts.”⁴⁴ For transport, the Commission has determined that “[b]ased on the economic characteristics . . . and the variability of the cost of deployment, we measure impairment with regard to dedicated transport on a route-by-route basis” and “[t]he tests that we adopt below therefore evaluate impairment through a focus on wire centers, the end-points of routes.”⁴⁵ The Commission has explicitly rejected examining the unbundling of loops and transport at larger geographic levels.⁴⁶ Verizon offers no response whatsoever to this precedent, and its attempt to analyze unbundling on a rate center basis should be rejected.

III. THE COMMISSION SHOULD DENY VERIZON’S PETITION BECAUSE THE EVIDENCE DOES NOT JUSTIFY FORBEARANCE

A. Verizon’s Evidence Of Competition In The Residential Market Is Fundamentally Flawed

Even leaving to one side Verizon’s gerrymandered geographic market, Verizon has not shown that forbearance is warranted. In the *Six MSA Order*, the Commission made clear that Verizon could not meet the test for forbearance with respect to the residential market in Virginia Beach because Verizon’s market share was significantly larger than Cox’s, the largest facilities-based competitor, and was approximately as large as the market share of all competitors,

⁴⁴ *In re Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 161 (2005) (“*Triennial Review Remand Order*”).

⁴⁵ *Id.* ¶¶ 79, 87.

⁴⁶ *See id.* ¶¶ 79-85 (adopting route-to-route market for analyzing impairment for transport); *id.* ¶¶ 161-164 (adopting wire center market approach for analyzing impairment for high-capacity loops).

including those using resale and Verizon's Wholesale Advantage product, combined.⁴⁷ Those facts remain true even if the Commission considers Verizon's gerrymandered geographic market. Verizon attempts to show it has a meaningfully smaller market share solely by manipulating the same data the Commission previously found required denial of Verizon's petition. But as shown in what follows the Petition fails for the same essential reason that Verizon's previous forbearance petition failed: Verizon remains the dominant provider of telecommunications.

1. Verizon's Petition Fails With Respect To The Residential Market Because It Misrepresents And Misuses Wireless Cut-The-Cord Competition

Verizon's attempt to show it does not maintain a dominant market share rests in large part on its claim that it faces substantial wireless cut-the-cord competition.⁴⁸ Even using Verizon's own deeply flawed data (discussed below), without cut-the-cord competition, Verizon controls more than **[Begin Highly Confidential]** **[End Highly Confidential]** of the residential market in the Cox service area of the Virginia Beach MSA and would not be entitled to forbearance under its own proposed test.⁴⁹ In any event, Verizon's use of cut-the-cord data is fundamentally flawed.

⁴⁷ See *Six MSA Order* ¶¶ 27, 37; see also *id.* ¶ 30 ("where the Commission has found an incumbent carrier to be nondominant in the provision of access services, it had a retail market share of less than 50 percent and faced significant facilities-based competition"); Verizon Petition at 10 ("[T]he Commission held that Verizon did not meet the share threshold for any of the six MSAs, including in the Virginia Beach MSA as a whole where Verizon demonstrated that competitive share of residential lines was **[Begin Confidential]** **[End Confidential]** percent."). Contrary to Verizon's claims, the Commission's reliance on market share data in the *Six MSA Order* is fully consistent with the Commission's prior decisions in the *Omaha Forebearance* and *ACS orders*. See *Six MSA Order* ¶¶ 27, 30; see also *In re Petition of ACS of Anchorage, Inc. Pursuant to Section of the Communications Act of 1934, as Amended* (47 U.S.C. § 160), for *Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order 22 FCC Rcd 16,304 (2007) ("*ACS Dominance Forbearance Order*"); *Omaha Forebearance Order*; *ACS UNE Forebearance Order*.

⁴⁸ See Petition at 13-15.

⁴⁹ See Petition Att. B.

a. As an initial matter, the Commission has not previously relied on cut-the-cord wireless competition in granting forbearance, and it should not do so now. In the *Six MSA Order*, the Commission considered cut-the-cord wireless customers in *rejecting* Verizon's petitions for forbearance, effectively giving Verizon the benefit of the doubt in considering its submissions. But where forbearance has been granted, the Commission has not previously relied on wireless competition, and in fact has suggested that it is not appropriate to consider in evaluating facilities-based competition.⁵⁰

More recently, the Commission has properly rejected the notion that wireless services are competitive substitutes for wireline local exchange service. Specifically, in its recent decision to cap universal service funding for largely wireless competitive eligible telecommunications carriers (ETCs), the Commission concluded that "the majority of households do not view wireline and wireless services to be direct substitutes," and that "rather than providing a complete substitute for traditional wireline service, these wireless competitive ETCs largely provide mobile wireless telephony service in addition to a customer's existing wireline service."⁵¹

These findings make clear that wireless service is not properly considered part of the same market as Verizon's wireline service. Even if, as Verizon argues, a small percentage of individuals have given up wireline service and rely exclusively on wireless service, it has not

⁵⁰ See, e.g., *ACS UNE Forbearance Order*, ¶ 23 ("Forbearing from section 251(c)(3) or section 252(d)(1) of the Act where no competitive carrier has constructed substantial competing last-mile facilities capable of providing telecommunications services is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Anchorage study area."); see also *id.* ¶¶ 2, 20, 27 (relying on cable competition); *ACS Dominance Forbearance Order* ¶¶ 28, 36 (same); *Omaha Forbearance Order* ¶¶ 25, 28, 58, 59, 62 (same).

⁵¹ *In re High-Cost Universal Service Support*, Order, WC Docket 05-337, FCC 08-122, ¶¶ 21, 20 (rel. May 1, 2008).

shown that this wireless competition meaningfully constrains wireline pricing. To the contrary, studies have shown that wireline providers can profitably increase prices regardless of the presence of wireless competition.⁵² Wireline and wireless services have numerous distinguishing characteristics. For example, wireline service typically provides high and consistent transmission quality, a common connection point for all members of a household, subscription costs that are generally lower than for mobile wireless service, and more accurate and reliable enhanced emergency capability than mobile wireless service.⁵³ Mobile wireless service, in contrast, can be used both at home or away, often limits the usage available without additional fees, typically costs more than wireline service, offers variable transmission quality, and is often limited by the battery life of a user's mobile phone.⁵⁴ Moreover, many wireline-based services are unavailable through wireless, including healthcare monitoring services, alarm services, personal safety services which might be used by the elderly or disabled, fax services, digital video recording, and satellite television services. Accordingly, even if there is limited substitutability between wireline and mobile wireless services, the Commission should not rely on the presence of mobile wireless alternatives to constrain the price of wireline service.⁵⁵ The Commission should thus not consider wireless customers at all in determining Verizon's market share.

b. Even if it were appropriate to consider data on wireless cut-the-cord customers in determining Verizon's market share, Verizon misreports this data. To begin with, Verizon improperly attributes its own Verizon Wireless customers to the competitive side of the analysis,

⁵² Kent W. Mikkelsen, *Mobile Wireless Service to "Cut the Cord" Households in FCC Analysis of Wireline Competition* (April 21, 2008), at 5 (attached as Exhibit 5).

⁵³ *Id.* at 6.

⁵⁴ *Id.* at 7.

⁵⁵ *Id.* at 8.

rather than attributing them to Verizon itself.⁵⁶ This approach is in direct contravention to the Commission's analysis in the *Six MSA Order*, as well as in previous decisions.⁵⁷ As the Commission explained, attributing Verizon Wireless' share to Verizon is necessary because a "wireline-affiliated [wireless] carrier would have an incentive to protect its wireline customer base from intermodal competition."⁵⁸

Verizon nevertheless contends that, regardless of any incentive it has to protect its wireline business, Verizon Wireless does not have the ability to do so because of competition it faces from other wireless carriers.⁵⁹ Verizon offers no factual support for this assertion, and the Commission has found precisely the opposite to be true. The Commission has previously found that "independent wireless carriers have a larger percentage of wireless-only customers than customers of ILEC-affiliated wireless carriers" and that, unlike ILEC-affiliated wireless carriers, independent wireless carriers offer services and promotions "that arguably have encouraged wireless substitution for wireline voice services."⁶⁰ Here, in contrast, Verizon's marketing

⁵⁶ Petition at 12-14 & Att. B.

⁵⁷ *Six MSA Order* at Appendix B, n.1 and n.6.

⁵⁸ *In re Applications of Nextel Comm'ns, Inc. and Sprint Corp. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13987, ¶ 142 (2005) ("*Nextel-Sprint Order*"); see also *In re Application of AT&T Wireless Services, Inc., Transferor, and Cingular Wireless Corp., Transferee, for Consent to Transfer Control of Licenses and Authorization*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 243 (2004) ("*AT&T-Cingular Order*").

⁵⁹ Petition at 15.

⁶⁰ *Nextel-Sprint Order* ¶ 142; see also *AT&T-Cingular Order* ¶ 244 ("Evidence in the record indicates that Cingular has developed and marketed many of its wireless products and services to complement - and specifically not to replace - residential wireline voice services."); *id.* ¶ 243 ("In fact, the documentary evidence indicates that AT&T Wireless [which was independent at the time] sought to encourage mass market consumers to cut the cord, and to develop technological enhancements and service offerings to encourage consumers to abandon the wireline network and to use wireless services in lieu of wireline services.") (footnote omitted).

explicitly encourages its users to maintain both wireline and wireless service and to discourage its users from cutting the cord to or otherwise abandon Verizon wireline service.⁶¹

c. Moreover, Verizon offers no reliable evidence supporting the number of cut-the-cord wireless customers who could conceivably bring competitive pressure in the Cox service area of the Virginia Beach MSA, and the estimate it does provide appears to be vastly overstated. Verizon relies exclusively on a Centers for Disease Control study created for unrelated purposes that estimates the national rate of wireless substitution at 13.6 percent.⁶² A nationwide study such as this (even if it were otherwise reliable) provides little insight on the level of competition in any particular state, much less the piece of the Virginia Beach MSA at issue here.⁶³ There are vast differences in the populations that live in different states, and Virginia has unique characteristics that make use of a national number likely to be significantly inaccurate. For example, many senior citizens live in the state, and part of the Virginia Beach MSA at issue here is well known as “a retirement mecca.”⁶⁴ Members of such a population are significantly less likely to cut the cord than others.

⁶¹ See, e.g., News Release, *Verizon Simplifies Bundles of Top-Quality Home Services, Adds Wireless Calling to Consumer Choices* (Jan. 30, 2007), available at <http://newscenter.verizon.com/press-releases/verizon/2007/verizon-simplifies-bundles-of.html>.

⁶² Petition at 12.

⁶³ In the *Six MSA Order*, the Commission gave Verizon the benefit of a similar CDC study in rejecting Verizon’s petitions for forbearance. But for the reasons discussed in the text, a national study like this one does not provide reliable information on the competitive impact of wireless service on wireline service at all, much less in Virginia Beach.

⁶⁴ Andrew Petkofsky, *Retirement Mecca*, Virginia Business News, July 2007, <http://www.gatewayva.com/biz/virginiabusiness/magazine/yr2007/jul07/region.shtml> (“The Williamsburg area (including James City County and upper York County) has become a retirement mecca. Money magazine named the region one of the country’s best places to retire.”).

*Of more probative value is the Virginia-specific estimate Verizon itself recently provided to the Virginia Commission showing only 6% of Virginia households are wireless only.*⁶⁵ Verizon made this claim to the Virginia Commission in 2007 in seeking a determination that retail services are competitive and could be detariffed. The company therefore had every incentive to make this number as large as possible, so at most this should be considered the *maximum* amount of cut-the-cord wireless competition in Virginia. Indeed, that 6% figure is likely overstated. In the last year, less than [Begin Confidential] [End Confidential] of former Cavalier customers chose to port their landline number to wireless carrier *or* a VoIP provider.⁶⁷ But ultimately, Verizon has provided no data that would indicate the amount of such competition that exists in the Virginia Beach MSA, and for this reason as well, the Commission should not consider wireless competition in making its forbearance determination.

2. Verizon Has Shown Insufficient Evidence Of Cable And CLEC Competition

Even if the Commission were generously to accept all of Verizon's other data as true, once the Commission excludes the improperly counted wireless customers, Verizon continues to serve more than [Begin Highly Confidential] [End Highly Confidential] of the lines in Verizon's proposed gerrymandered Virginia Beach territory.⁶⁸ Indeed, even if the Commission counts the cut-the-cord wireless service at the 6% level that Verizon has asserted is appropriate

⁶⁵ See Verizon Application dated January 7, 2007, p. 2, Case No. PUC-2007-00008, Virginia State Corporation Commission, Direct Testimony of Trevor R. Roycroft, PhD, Consumer Counsel, p 72 (excerpts attached as Exhibit 6)

⁶⁷ See Wainwright Decl. ¶ 8.

⁶⁸ Verizon asserts that it has almost a [Begin Highly Confidential] [End Highly Confidential] greater market share than Cox, with Verizon allegedly having [Begin Highly Confidential] [End Highly Confidential] primary residential lines and Cox having, by Verizon's estimate, [Begin Highly Confidential] [End Highly Confidential] lines. See Petition Att. B. Verizon's own inflated estimates of CLECs competing via resale and Wholesale Advantage show only a miniscule [Begin Highly Confidential] [End Highly Confidential] such lines.